Impact of Timber Harvesting on a Tourism Business near Ootsa Lake

Complaint Investigation 040619

FPB/IRC/105

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The Investigation

In December 2004, the Board received a complaint from the owner of a tourism business (the complainant) that logging by Tyeewood Incorporated near Ootsa Lake is harming his business, and trespassing on timber harvesting rights previously granted to him.

The Board investigated whether logging was consistent with strategic guidance for tourism and recreation; whether harvesting was consistent with the Ministry of Forest's (MOF) commitments to the complainant; and whether consultation on the proposed forestry development was adequate.

Background

In the 1980's, the complainant established his home and tourism business on Ootsa Lake, in the Nadina Forest District. The business involved flying clients from there to another property he owns and to nearby Tweedsmuir Provincial Park and other wilderness areas. The complainant built a clientele by promoting the wilderness and semi-wilderness experience provided by the forested land around Ootsa Lake.

Over time, the landscape changed as Crown and private land in the complainant's area of operation was logged. Changes to the landscape accelerated in 2002, when MOF doubled the rate of harvesting in the Lakes Timber Supply Area-initially to control an epidemic mountain pine beetle outbreak and later to salvage dead trees. Today, much of the area no longer provides the wilderness and semi-wilderness experience sought by the complainant's clients. Consequently, his business has deteriorated.

The complainant discussed his growing concerns about logging with MOF over the years. Much of that logging was done by MOF's Small Business Forest Enterprise Program (SBFEP)[1]. In response, in January 2002, the district manager granted the complainant a timber sale licence for the small scale salvage of beetle-infested timber, to allow him to manage mountain pine beetle in a way compatible with his tourism business. The licence applied to two areas of provincial forest, one area covering 256 hectares, about 800 metres north of the complainant's property, and the other area covering 275 hectares, directly south of, and across the lake from the complainant's property. Both are popular walking areas for the complainant's clients. The complainant is not a registered user of Crown land.
The timber sale licence allowed the complainant to harvest up to 500 cubic metres of timber annually for three years. MOF issued the complainant several cutting permits for the timber

[1] Small Business Forest Enterprise Program was a Ministry of Forests program that enabled registered individuals or companies to acquire rights to harvest Crown timber under a timber sale licence. The Ministry of Forests held responsibility for most forestry planning and management requirements. It has since been replaced by the British Columbia Timber Sales Program.

sale licence from 2002 until 2005. To date, the complaint has harvested a total of 165 cubic metres under his licence.

The southern portion of the complainant's timber license was selected as a candidate old growth management area (OGMA)[2] by the Ministry of Sustainable Resource Management (MSRM)—the agency responsible for the OGMA process—in July 2003. That designation could provide ongoing protection for the complainant's interests by restricting logging. MSRM considered the northern portion as a candidate OGMA, but did not designate it as such. No OGMAs have yet been formally designated in the license area.

In December 2003, MOF granted another licence–a non-replaceable forest licence (NRFL)[3]—to Tyeewood Incorporated (the licensee)—to salvage dead trees, after the beetle infestation passed north and west of the complainant's home. The NRFL covers about 6,000 hectares, and overlaps with the northern part of the complainant's timber sale licence. The NRFL is valid for five years, allowing the licensee to harvest a total of 40,000 cubic metres. The licensee also manages a second forest licence on behalf of another party, bringing the total allowable harvest under its management to 80,000 cubic metres.

The licensee prepared a forest development plan (FDP) and submitted it for approval in December 2003. The FDP did not identify the location of cutblocks because the licensee proposed to harvest under the *Bark Beetle Regulation*.[4] The district manager approved the licensee's FDP and issued the licensee a blanket cutting permit covering the entire area of the NRFL.

The licensee started harvesting in January 2004 and logged eight cutblocks, totalling 36 hectares, in the area that overlapped the northern part of the complainant's timber sale licence. The complainant returned from a business trip in May 2004, discovered the clearcuts and concluded that the logging trespassed on his timber sale licence. MOF investigated and found that the complainant did not have exclusive harvesting rights for the area of the timber sale licence as the licence was volume-based, rather than area-based. Therefore, no trespass had occurred, and there was no basis for enforcement action against the licensee.

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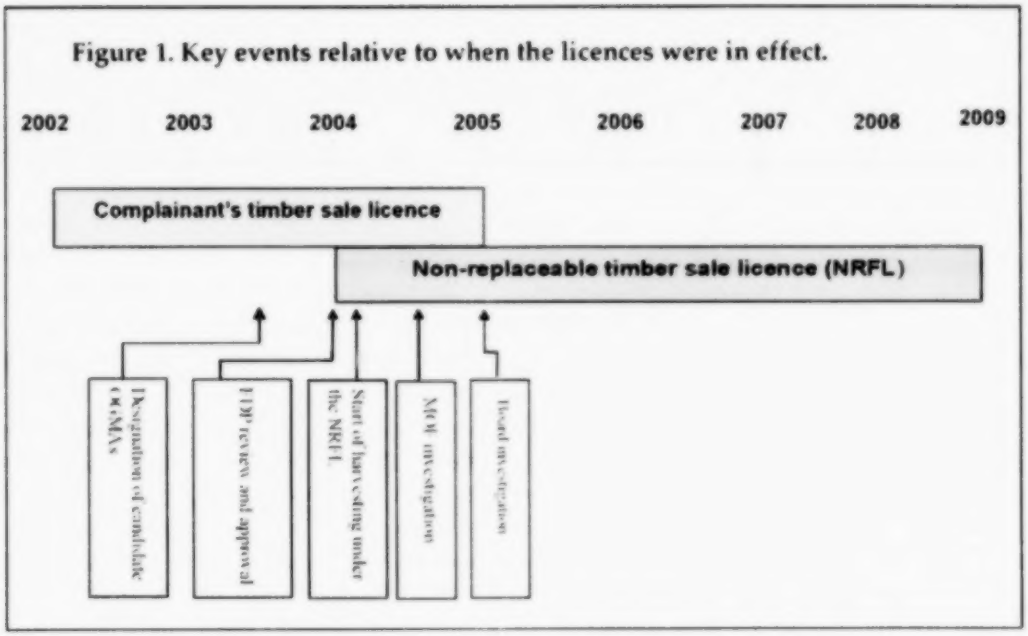
[2] Old-growth management areas are areas that contain, or are managed to replace, specific structural old-growth attributes and which are mapped out and treated as special management areas.

[3] A licence that allows timber harvesting in a designated period of time, usually five years

[4] The *Bark Beetle Regulation* allows for expedited harvesting of beetle-infested areas by simplifying planning requirements.



The complainant submitted a complaint to the Board in December 2004. The licensee intends to resume harvesting north of the complainant's home in the summer of 2005.

Issues Investigated

The complainant believes the area had higher value for tourism than for timber and should not have been logged; that harvesting was illegal and contrary to MOF's commitment to him; and that MOF and the licensee deliberately excluded him from consultation on the proposed logging.

The Board addressed the issues of the complaint by investigating:

1. Was logging the area consistent with strategic guidance for tourism and recreation?
2. Was harvesting consistent with the MOF's commitment to the complainant?
3. Was consultation on the proposed forestry development adequate?

Discussion

Was logging the area consistent with strategic guidance for tourism and recreation?

The complainant believes the area has higher value for tourism than it does for timber, but that timber interests routinely and unfairly override other business interests and values. Specifically, the complainant believes there was no need to log in the area that was both

used by his clients and licensed to him for small-scale salvage, given the wide availability of beetle-killed timber elsewhere in the Ootsa Lake area.

Land use decisions for Crown forest land, such as whether to permit logging or create a protected area, are addressed in strategic planning processes such as land and resource management plans (LRMPs). The Lakes District LRMP provides broad strategic direction for the sustainable management of forest resources in the district. A subsequent Lakes South Sustainable Resource Management Plan (SRMP) provides further operational-level guidance for achieving the LRMP objectives for biodiversity, while managing for the mountain pine beetle infestation.

The complainant participated in the LRMP process, but the resulting LRMP and SRMP do not address tourism issues to his satisfaction. The Board does not have jurisdiction to review the appropriateness of locally-developed and government-endorsed land-use plans. However, the Board can examine whether forestry planning and practices are consistent with LRMP direction. In this case, while there was no legal requirement to ensure consistency with LRMP objectives for tourism and recreation[5], the LRMP outlines public expectations for managing forest resources. Therefore, the Board assessed whether logging the area was consistent with those non-binding LRMP objectives.

The LRMP recognizes that tourism generates a small but significant amount of employment and income in the plan area, and that outdoor recreation experiences are the driving force behind tourism. It provides for maintaining a wide spectrum of public recreation and tourism values and opportunities. Commercial recreation is considered a valid and appropriate use on Crown land, subject to the acquisition of required tenures/permits and adherence to approved management plans.

However, the LRMP also states that tourism and recreation will be accommodated primarily through ten backcountry lakes, nearby Tweedsmuir Park and the creation of three new protected areas. Furthermore, the plan recognizes that semi-primitive recreation opportunities[6] will, over time, be severely diminished elsewhere.

In summary, the LRMP focuses tourism and recreation in designated areas, while allowing for commercial recreation elsewhere on Crown land, subject to permits and conformance with management plans. The LRMP does not restrict or prohibit timber harvesting in the area north of the complainant's home for tourism or recreation. For those reasons, logging in the area north of the complainant's property is consistent with the LRMP's objectives and strategies for tourism and recreation.

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[5] Section 11(1)(d) of the *Forest Practices Code of British Columbia Act* required a licensee to ensure that its forest development plan was materially consistent with any higher level plan. Biodiversity targets and objectives in the Lakes District LRMP and the Lakes South SRMP have been established as "higher level plans" under the Code, but other targets and objectives, including those related to tourism and recreation, have not.

[6] Defined as greater than 1km from a 4-wheel drive road and exceeding 500 hectares.

Was harvesting consistent with the MOF's commitment to the complainant?

The complainant believes that he had exclusive rights to harvest in the area of his timber sale licence, and that MOF incorrectly concluded that no trespass occurred. Furthermore, he believes that MOF contradicted its commitment to allow him to manage the area in a manner compatible with tourism. The investigation considered whether the licensee's harvesting in the area of the complainant's timber sale licence was consistent with the Code, and with commitments made by MOF to the complainant.

The *Forest Practices Code of British Columbia Act* (the Code) prohibited the cutting of Crown timber unless authorized to do so (section 96(1)). The licensee's cutting permit authorized it to harvest in the area that overlapped with the complainant's timber sale licence. The Board confirmed the findings of MOF's investigation: the NRFL and cutting permit did not restrict or prohibit the licensee from harvesting in the area of the timber sale licence. Therefore, the licensee did not trespass on the complainant's timber sale licence. Under the Code, the complainant did not have exclusive harvesting rights to the area of the timber sale license.

While no trespass occurred, SBFEP made the following commitment to the complainant in 2001 to address conflicts between that program and the complainant:

> "I recognise the importance of the Provincial Forest around Chief Louis Arm for the semi-wilderness experience of your clients. It is not the intention of SBFEP to reduce your potential use of this area through our forest health management activities. I have discussed with [the district manager] the proposal to have you involved in the management of the area and he is in full agreement. It only seems logical that you would have the motivation to ensure that the forest health issues are managed in a way that is compatible with your eco-tourism business." (Letter from the senior forester of the SBFEP program, Feb. 7, 2001)

MOF staff subsequently explained that the letter indicates only that the complainant would participate in the harvesting of the area. However, the district manager clarified that the resulting timber sale licence was, in fact, intended to exclude all large scale harvesting by other operators, but only until the designation of draft old growth management areas (OGMAs). Such OGMA designation would provide ongoing protection for the complainant's interests. Only when the Ministry of Sustainable Resource Management (MSRM)—the agency responsible for the OGMA process—decided not to designate the area as a candidate OGMA, did MOF award the NRFL to allow larger-scale salvage of beetle-killed timber. Finally, the district manager stated that he and other staff met with the complainant on several occasions, informing him that the dead mountain pine beetle timber had become a high priority for harvesting before it degraded in value, so a shift to large-scale harvesting was necessary.

While MOF met with the complainant to discuss his concerns, it did not explain that exclusion of large scale harvesting was temporary, pending the designation of candidate OGMAs. When MOF decided that large scale operations were needed, it did not retract or clarify the letter, or inform the complainant that another licence had been awarded. Therefore, the complainant had grounds to believe that MOF committed to ensuring that harvesting in the area would be compatible with his tourism business, for the duration of the timber sale licence.

In summary, the licensee's harvesting did not trespass on the complainant's timber sale licence and the complainant did not have exclusive timber harvesting rights to the area. However, it was reasonable for the complainant to conclude that MOF did not live up to a commitment to ensure harvesting in the area of the timber sale licence occurred in a manner compatible with tourism.

Was consultation adequate?

The complainant believes he should have been informed about the awarding of the NRFL and consulted about the logging proposed under the NRFL. He believes the failure to consult was deliberate and that MOF and the licensee had no interest in considering or addressing his concerns.

The awarding of the NRFL relates to the *Forest Act* and is outside of the Board's authority to investigate. Therefore, the investigation considered the adequacy of consultation only in regard to the proposed logging. The Board assessed whether consultation on the proposed logging was consistent with the requirements of the Code, the strategic guidance in the LRMP, and MOF's commitment to the complainant.

The Code promotes consultation by providing minimum requirements for making an FDP available for public review and comment (section 39 of the Code). Requirements include publishing a notice in a local newspaper (section 25 of the *Operational and Site Planning Regulation or OSPR*) and providing a 60-day review period for the interested or affected public to review and comment on an FDP (section 27 of the OSPR).

In this case, the licensee advertised the FDP in the local paper and made the plan available for public review and comment in two different locations for a period of 60 days. No written comments were received from the complainant or other members of the public. Therefore, the licensee met Code requirements for review and comment.

Expectations for consultation are also set by the LRMP. The LRMP states that a sustainable supply of timber for local mills is extremely important, but acknowledges other community concerns including conservation and recreation management, meaningful consultation, and sensitive development adjacent to private lands. It states that resource development adjacent to private property is to be conducted in a manner sensitive to the needs of

property owners, and that active involvement in consultation on the part of both parties will be required to resolve adjacency issues and concerns.

The licensee stated in its FDP that it would address the LRMP strategy by communicating with adjacent private property owners where the situation arises. However, the licensee did not consider that its FDP commitment applied to the complainant since forestry operations were not immediately adjacent to the complainant's property (logging was no closer than 800 metres from the complainant's property).

The Board interprets the LRMP objectives more broadly, believing that "meaningful consultation" would involve consulting parties that might reasonably be affected by proposed development, even when the parties are not immediately adjacent to the proposed development. In this case, the complainant had previously expressed concerns to MOF about the impact of harvesting on his tourism business. In the Board's view, the LRMP recommends a greater degree of consultation than occurred here.

An intent to consult with the complainant on harvesting was also set out in MOF's letter of February 7, 2001. The district manager agreed to involve the complainant in the management of the area. In the Board's view, that implies consultation. MOF did not ensure that the licensee consulted with the complainant about the proposed logging. Therefore, the lack of consultation was inconsistent with MOF's communication.

Many factors contributed to the absence of consultation. The complainant did not review and comment on proposed development because he was not aware of the proposal, having no reason to believe that MOF had issued another licence for the same area as his timber sale licence. Consequently, the licensee did not become aware of the complainant's tourism interests during the review and comment period. MOF followed its normal practice for consultation. This does not include notifying all other parties that have previously expressed concerns, notifying incoming licensees about those previous concerns, or notifying incoming licensees about unregistered businesses operating in or near the area covered by the FDP. Finally, the 2001 letter outlining commitments to the complainant was contained in the files held by the SBFEP, and was not known to the licensee or the acting district manager who approved the FDP. Those reasons do not excuse the lack of notification and consultation, but suggest that the licensee and MOF did not deliberately exclude the complainant from commenting on the harvesting proposals.

In summary, the opportunity for review and comment on proposed development met the requirements of the Code and followed MOF's standard practices. However, the licensee's and MOF's consultation was inadequate, given the strategic guidance in the LRMP and MOF's commitment to involve the complainant in the management of the area. The result is that the complainant did not have an opportunity to influence how forestry development occurred, despite the potential impact of that development on the tourism values supported the business operated by the complainant.

Conclusions

Permitting logging in the area to the north of the complainant's property is consistent with the LRMP's objectives and strategies. The licensee's logging did not trespass on the complainant's timber sale licence. The licensee also met the Code's requirements for public review and comment on the forest development plan. However, it was reasonable for the complainant to conclude that MOF did not live up to a commitment to ensure harvesting in the area of the timber sale licence would occur in a manner compatible with tourism.

MOF took an innovative approach to managing the complainant's business interests in the area by awarding the timber sale licence. However, it made subsequent decisions that overrode the complainant's interests, without adequate consultation or notification. Consequently, the complainant did not have an opportunity to influence how forestry development occurred in the TSL area, despite the potential impact of that development on the tourism values important to the complainant's business. Direct consultation on the proposed logging was warranted, given the LRMP's guidance and MOF's commitment to involve the complainant in the management of the area.

Recommendations

The Nadina Forest District has expansive areas of beetle-killed timber that MOF wishes to address expediently, an increasing proportion of short-term licences awarded to new forest companies, and a large number of private property holders situated next to Crown forest land. That operating environment requires particular care to ensure that the interests of private property owners and overlapping business interests are fully considered during the preparation and approval of forest development plans.

As provided by section 131 of FRPA, the Board makes the following recommendation:

> The MOF Nadina Forest District, in consultation with its licensees, develop processes to promote effective consultation with private property owners and overlapping business interests that are likely to be affected by proposed forestry development.

In accordance with section 132 of FRPA, the Board requests that MOF Nadina Forest District advise the Board by December 31, 2005, of the actions taken to address this recommendation.

The Board also encourages the complainant to explore obtaining a tenure or licence from government for his tourism use of Crown land to help ensure that, in the future, his interests in the area are formally recognized.